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PROTECTING HUMANITARIAN AID: EU PROHIBITS CRIMINALISATION OF ASYLUM-SEEKER ASSISTANCE[**]

1. *Introduction*

Providing humanitarian aid and support to migrants and refugees can come in different forms. Examples include rescuing them at sea, offering legal assistance, advocating for their rights, and providing essential items such as food, shelter, warm clothing, sanitation, and emergency healthcare[2].

Many countries and international organisations[3] recognise the importance of humanitarian aid and have taken measures to protect and promote the work of people and

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[2] COE, *Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States*, Thematic Study prepared by Carla Ferstman on behalf of the Expert Council on NGO Law Conference of INGOs of the Council of Europe, CONF/EXP (2019)1 December 2019, par. 18.

[3] As an example, on Monday January 9, 2023, the United Nations Security Council renewed and extended for six months the cross-border resolution on Syria (RCSNU 2642) in order to continue allowing the delivery of humanitarian aid to the northwest of the country. Among the humanitarian leaders who urged the Security Council to maintain the lifeline of cross-border assistance in Northeast Syria, are the signatures of: Mr. Martin Griffiths, Emergency Relief Coordinator and Under-Secretary-General for Humanitarian Affairs (OCHA); Mr. António Vitorino, Director-General, International Organisation for Migration (IOM); Mr. Filippo Grandi,

NGOs that provide it. In fact, NGOs are not the only organisations working towards providing aid and support. Global intergovernmental organisations like the United Nations High Commissioner for Refugees (UNHCR), International Organisation for Migration (IOM), World Food Programme (WFP), World Health Organisation (WHO), and the United Nations Children's Fund (UNICEF) also play a significant role[4]. Additionally, regional structures such as European Union (EU) missions, EU regional task forces, and EU agencies such as the European Asylum Support Office, Frontex, and Europol often work in partnership with local governments, and may even take the lead in providing services at hotspots and camps[5]. This humanitarian work is very important given the state of vulnerability of migrants in these spaces.

However, in the pursuit of fighting against irregular immigration, these people or non-governmental organisations that provide humanitarian aid may be criminalised by the States, and the main consequences will affect the rights of migrants and refugees.

Criminalising humanitarian aid refers to the practice of punishing people or organisations that provide humanitarian aid to those in need, particularly refugees or irregular immigrants.

The criminalisation of the actions of NGOs and people who provide assistance has been made possible in part due to the criminalisation of migration and those who migrate[6]. Even though seeking asylum is a lawful act and it is more suitable to view unauthorised entry into a country as a violation of immigration laws (as administrative infractions) rather than a criminal offence, refugees and other migrants are often labelled as "illegal"[7].

That's way, the criminalisation of migrant solidarity needs to be examined within the context of the broader trend of criminalising migration, also known as *crimmigration*[8]. The

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United Nations High Commissioner for Refugees (UNHCR); Ms. Catherine Russell, Executive Director, United Nations Children's Fund (UNICEF); Mr. David Beasley, Executive Director, World Food Programme (WFP); Dr. Tedros Adhanom Ghebreyesus, Director-General, World Health Organisation (WHO). Available on: https://www.iom.int/es/news/los-lideres-humanitarios-de-naciones-unidas-urgen-al-consejo-de-seguridad-para-que-siga-preservando-la-cuerda-salvavidas-de-asistencia-transfronteriza-en-el-noroeste-de-siria.

[4] COE, *Using Criminal Law*, cit., p. 9.

[5] *Ibid.*, p. 9.

[6] See generally, COE COMMISSIONER FOR HUMAN RIGHTS, *Issue Paper: Criminalisation of Migration in Europe: Human Rights Implications*, CommDH/IssuePaper (2010)1.

[7] C. DAUVERGNE, *Making People Illegal: What Globalization means for Migration and Law,* Cambridge, 2008. "Illegal migration" is the terminology used in Article 79 of the Treaty on the Functioning of the European Union, OJC 326/47, Oct. 26, 2012, done Feb. 7, 1992, entered into force Nov. 1, 1993. Note however that later instruments such as the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, Dec. 24, 2008, avoids the term. For further on terminology see C. MOREHOUSE AND M. BLOMFIELD, *Irregular Migration in Europe,* in *Migration Policy Institute*, December 2011, pp. 4-6.

[8] The term "*crimmigration*" is a combination of the words "crime" and "immigration". It is used to describe the intersection of criminal justice and immigration systems, specifically the ways in which they overlap and impact one another. The term has been used to describe the increasing criminalisation of immigration and the use of criminal justice tools, such as detention and deportation, in immigration enforcement. The term "*crimmigration"* was first used by a group of scholars in the early 2000s, in the United States. The exact origin of the term is difficult to pinpoint as it has been used by multiple scholars and practitioners in various publications and reports. However, some of the earliest known uses of the term can be found in the work of scholars such as J. STUMPF, who used the term in her 2006 article *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power* in *Am. Un. Law Rev.*; and in the work of K. JOHNSON, who used the term in his 2006 article *The Crimmigration Crisis: Immigrants, Crime, and the Evolution of Federal Law*, in *Univ. Illinois Law Rev.*, among others.

intersection of migration and criminal law, known as *crimmigration*, is a prominent aspect of current migration policies[9].

The European Union Member States have taken steps to criminalise migration by portraying migrants as a security risk and implementing tactics of separation and selective aid. This can be seen in the criminalisation, detention, and imprisonment of migrants[10]. As a result, those who assist undocumented immigrants may also be considered criminals themselves.

Member States policies related to border control and immigration have been known to infringe on the rights of migrants through the use of internal and external borders, as well as through policies that restrict freedom of movement and make it difficult for migrants to find safe passage[11]. These actions violate human rights and international law and often result in fatalities at the border[12]. However, those responsible for these acts of violence are rarely held accountable[13]. In contrast, individuals and groups who work to support migrants are often criminalised through the use of legal and administrative measures, such as the ones we are going to study below.

The sanctions that are usually used to criminalise NGOs and volunteers have to do with the legislation that punishes the smuggling of migrants[14]. In November 2017, the publication "Humanitarianism: the unacceptable face of solidarity", which examined the criminalisation of humanitarian aid, was released by the Institute of Race Relations (IRR)[15]. Additionally, the latest report requested by Director General for Internal Policies of the Union (DG IPOL), in 2018[16], examined European Union regulation on smuggling of migrants and its impact on the criminalisation of those who provide assistance such as food, shelter, and clean water to border crossers[17]. Both reports provide evidence of EU Member States using anti-trafficking and smuggling laws to criminalise acts of solidarity with migrants. Authors, as Carrera, Allsopp, and Vosyliūtė[18] refer to this phenomenon as "policing the

[9] J. STUMPF, *The crimmigration crisis: Immigrants, crime, and sovereign power*, in *Am. Un. Law Rev.*, 2006, pp. 367-419.
[10] See M. BOSWORTH, *Inside immigration detention*, Oxford, 2014; L. MARTIN, '*Catch and remove': Detention, deterrence, and discipline in US noncitizen family detention practice*, in *Geopolitics*, 17(2), pp. 312-34; A. MOUNTZ, *The enforcement archipelago: Detention, haunting, and asylum on islands*, in *Political Geography*, 2011, pp. 118-128.
[11] D. BIGO, *The (in) securitization practices of the three universes of EU border control: Military/Navy–border guards/police–database analysts*, in *Security Dialogue*, 2014, pp. 209-225; V. CANNING, *Degradation by design: Women and asylum in northern Europe*, in *Race and Class*, 2019, pp. 46-63; L. PEZZANI, AND C. HELLER, *A disobedient gaze: Strategic interventions in the knowledge- (s) of maritime borders*, in *Postcolonial Studies*, 2013, pp. 289-298.
[12] D. DADUSC, P. MUDU, *Care without Control: The Humanitarian Industrial Complex and Criminalisation of Solidarity*, in *Geopolitics*, 2020, p. 1205 ss.
[13] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families of the UN urges Spain and Morocco to investigate tragedy at Melilla border where at least 23 sub-Saharan migrants died. For more information about this event: https://news.un.org/es/story/2022/06/1510992
[14] COE, *Using Criminal Law*, cit., par. 68.
[15] Drawing on the work of advocacy organisations across Europe, provides a sample of twenty-six case studies involving prosecutions of 45 individual humanitarian actors under anti-smuggling or immigration laws since September 2015 in L. FEKETE, F. WEBBER AND E. A. PETTITT, *Humanitarianism: The unacceptable face of solidarity,* London: Institute of Racial Relations, 2017. The European Commission response to this evaluation is available on: https://irr.org.uk/app/uploads/2018/02/EU-commission-response.pdf.
[16] S. CARRERA, *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: 2018 Update*, report commissioned by the Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee, European Parliament, December 2018.
[17] M. PROVERA, *The criminalisation of irregular migration in the European Union,* in *CEPS Paper in Liberty and Security in Europe*, 2015.
[18] S. CARRERA, J. ALLSOPP, AND L. VOSYLIŪTĖ, *Policing the mobility society: The effects of EU anti-migrant smuggling policies on humanitarianism*, in *Int. Jour. Migr. Bord. Stud.* (IJMBS), 2018, pp. 236-276.

mobility society" and argue that it encompasses not only formal criminalisation (arrests, prosecutions, convictions) but also broader forms of intimidation and disciplinary action against acts of solidarity with migrants.

In the course of this paper, we will devote the next section to the analysis of international regulations on smuggling of migrants and we will look at how the European Union implements these international standards in its regional framework and the relationship of both regulations to humanitarian aid. We will also analyse the European Union's asylum legislations that guarantee humanitarian aid to applicants for international protection (Section 2). In the subsequent section, we will analyse an instance of employing domestic laws to prosecute individuals or organisations who offer aid to migrants, with the intention of discouraging NGOs, lawyers, and other individuals from providing support which could be found in the Hungarian Law[19] and the response given by the Court of Justice of the European Union (CJEU) when Member States try to take advantage of the alleged weaknesses of the European Union legal framework (Section 3). Finally, we will assess what the consequences may be in undermining the rights of applicants for international protection through policies that criminalise humanitarian aid (Section 4) and we will proceed to the final conclusions (Section 5).

2. *Insufficient implementation of international standards by the European Union?*

Prior to the early 1990s, the topic of migrant smuggling was not a subject of official discussion at the international level[20]. In December 1993, the United Nations passed a resolution on "prevention of smuggling of aliens"[21] in the General Assembly. This resolution stated that the Assembly was concerned about "the activities of criminal organisations that profit illicitly by smuggling human beings and preying on the dignity and lives of migrants", which contribute to the complexity of the increasing international migration phenomenon. After the Vienna Process[22], in November 2000, the General Assembly adopted the Organised Crime Convention[23], which includes three additional protocols: one on Smuggling of Migrants[24], one on Trafficking in Persons, Especially Women and Children[25], and one on

[19] INTERNATIONAL COMMISSION OF JURIST, *Criminalization of humanitarian and other support and assistance to migrants and the defence of their human rights in the EU*, April 2022, p. 7.
[20] A.T. GALLAGHER, F. DAVID, *The International Law of Migrant Smuggling,* Cambridge, 2014, p. 31 ss.
[21] UN GENERAL ASSEMBLY, *Prevention of the Smuggling of Aliens*, GA Res. 48/102, UN GAOR, 48th sess, Agenda Item 10, UN Doc. A/RES/48/102, Mar. 8, 1994, adopted Dec.20, 1993 (UNGA Res.48/102).
[22] The Vienna process as it came to be known, represented the first comprehensive attempt by international community to invoke international law as a weapon against transnational organised crime. For more information see A.T. GALLAGHER, *Human Rights and Human Trafficking Quagmire or Firm Ground?*, pp. 833-841.
[23] UN GENERAL ASSEMBLY, *United Nations Convention against Transnational Organized Crime*, 2225 UNTS 209, done Nov. 15, 2000, entered into force Sept. 29, 2003 (Organised Crime Convention).
[24] UN GENERAL ASSEMBLY, *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, signed in New York, 15 November 2000, entered into force in 28 January 2004, United Nations, Treaty Series, vol. 2241, p. 507 (Migrant Smuggling Protocol).
[25] UN GENERAL ASSEMBLY, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 2237 UNTS 319, done Nov. 15, 2000, entered into force Dec. 25, 2003 (Trafficking Protocol).

Trafficking in Firearms[26]. Of these three protocols, the Protocol against the Smuggling of Migrants by Land, Sea, and Air (the "Migrant Smuggling Protocol") is the most relevant to this study, as it is the first international instrument to provide a common definition of migrant smuggling. It describes the crime of migrant smuggling as «the procurement, in order to obtain directly or indirectly, a financial or other material benefit, of illegal entry of a person into a State Party of which the person is not a national or a permanent resident»[27].

While the Migrant Smuggling Protocol is the most comprehensive multilateral agreement on obligations related to migrant smuggling, it exists and operates within the context of a larger network of regional and bilateral treaties and instruments. With a few exceptions, "migrant smuggling" is rarely specifically mentioned in these documents. This is the case for the European Union[28]. As we will see below, even though apprehensions expressed during the formulation and discussion of instruments related to this matter, the EU decided to introduce a new criminal notion, such as "facilitation of residence and stay"[29].

The European Union became a party to the Migrant Smuggling Protocol in 2006[30], and has also established a legal framework to combat this issue. All EU Member States, except Ireland[31], have ratified it. Concern about irregular migration at the European Union level became a priority in the late 1980s, following the reunification of Germany and the collapse of the Soviet Union. One reason for the development of common policies and collective action in this region is the presence of structures that facilitate such efforts. This has contributed to the creation of legal rules related to migrant smuggling, which is unique to this region. The existence of these rules, along with the support for collective action, has provided significant motivation for cooperation on both bilateral and regional levels[32].

In 1990, the European Union's Member States established for the first time a collective effort to combat human smugglers and individuals who assist in illegal entry, residency, or movement across EU borders, under the framework of the Schengen Agreement[33]. Through Article 27(1) of Schengen Convention the States Parties addressed the subject of facilitated illegal migration by requiring Contract States to impose appropriate penalties on «any person who, for financial gain, assists or tries to assist an alien to enter or reside in the territory of one of the Contracting Parties in breach of that Contracting Party's law on the entry and residence of aliens»[34].

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[26] UN GENERAL ASSEMBLY, *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*, 2326 UNTS 208, done May 31, 2001, entered into force July 3, 2005 (Firearms Protocol).

[27] Article 3(a) of *Migrant Smuggling Protocol.*

[28] A.T. GALLAGGHER, F. DAVID, *The International Law of Migrant Smuggling,* cit., p. 86 ss.

[29] S. CARRERA, *Fit for Purpose? The Facilitation Directive,* cit.

[30] COUNCIL OF THE EUROPEAN UNION, *Council Decision 2006/616/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of this Protocol fall within the scope of Articles 179 and 181(a) of the Treaty establishing the European Community*, in OJ L 262, 22.9.2006, pp. 24-33.

[31] Ireland signed the *Migrant Smuggling Protocol* in December 2000, but has not yet completed the process of ratification.

[32] A.T. GALLAGGHER, F. DAVID, *The International Law of Migrant Smuggling,* cit., p. 87 ss.

[33] L. FEKETE, F. WEBBER, AND E. A. PETTITT, *Humanitarianism: The unacceptable face of solidarity,* London, Institute of Racial Relations, 2017, p. 8.

[34] EUROPEAN UNION, *Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*, OJ L 239/19, Sept. 22, 2000, done June 19, 1990, entered into force Sept.1, 1993 (Schengen Convention).

It is in this context when, the European Union passed Directive 2002/90[35] on November 28, 2002 (the "Facilitation Directive"), which was originally proposed by the government of France. The purpose of this directive was to establish a common definition for facilitating unauthorised entry, transit, and residence in EU Member States[36]. The directive required Member States to impose appropriate and effective sanctions on anyone who intentionally helps a non-member state national enter or transit through a Member State in violation of that state's laws, or who assists such a person to reside in a Member State illegally for financial gain.

The Facilitation Directive is accompanied by a Framework Decision[37], also proposed by France and adopted on the same day, which outlines minimum rules for penalties for legal persons and jurisdiction in these matters. These two instruments are collectively known as the "Facilitators Package"[38].

The Facilitation Directive and Framework Decision, as defined in Article 27 of the Schengen Convention, clarify the division between the first and third pillars regarding facilitations of illegal entry, residence, or movement. The Facilitation Directive outlines measures to address such facilitations, while the Framework Decision establishes criminal penalties and jurisdiction rules. It has been debated whether certain elements of the Framework Decision, particularly its definition of criminal offences, fell under the purview of the European Community prior to the CJEU's subsequent judgments on the Community's competence in criminal law matters. With the implementation of the Treaty of Lisbon[39], the entire Framework Decision is now covered under Article 83(2) of the TFEU[40] [41].

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[35] COUNCIL OF THE EUROPEAN UNION, *Council Directive 2002/90/EC of 28 November 2002 Defining the Facilitation of Unauthorised Entry, Transit and Residence*, in OJ L 328/17 (Facilitation Directive).

[36] This Directive is adopted under Article 63(b) of the *Amsterdam Treaty* which required the Council to adopt measures on immigration policies, illegal residence, including repatriation of illegal residents. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts OJ C 340, 10.11.1997, p. 1-144 (97/C 340/01). The analysis begins with the Treaty of Amsterdam, as it was only after its entry into force that the European Community gained the ability to implement measures on various aspects of immigration and asylum law. The transfer of competency for immigration issues to the EU signified a shift towards a unified approach. However, these measures did not prevent any Member State from maintaining or introducing national provisions in these areas which were compatible with the Treaty and international agreements.

[37] COUNCIL OF THE EUROPEAN UNION, *Council Framework Decision 2002/946/JHA of 28 November 2002 on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorised Entry, Transit and Residence*, in OJ L 328/1 (Framework Decision).

[38] EUROPEAN COMMISSION, Communication from the Commission, *Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence 2020/C 323/01*, C/2020/6470, OJ C 323, 1.10.2020, pp. 1-6.

[39] EUROPEAN UNION, *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, signed at Lisbon, 13 December 2007, entered into force Dec.1, 2009 OJ C 306, 17.12.2007, pp. 1-271.

[40] EUROPEAN UNION, *Consolidated version of the Treaty on the Functioning of the European Union* OJ C 326, 26.10.2012, p. 47-390. According to Article 83(2) of the *TFUE*: «If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76».

[41] E. PEERS, *Eu Justice and Home Affairs*, Oxford University Press, 2011, pp. 535-539.

Thus, the provisions outlined in Article 27(1) of the Schengen Convention were eventually replaced by Directive 2002/90[42] and a related Framework Decision under the third pillar, effective as of December 5th, 2004. Member States were required to enforce both of these measures at that time[43]. Both instruments remain in force despite changes within the legislative structure of the European Union. With the implementation of the Treaty of Lisbon[44], the Facilitation Directive falls under the purview of the CJEU[45]. Similarly, the Framework Decision is also under the jurisdiction of the CJEU, starting from December 1, 2014[46].

When comparing the Facilitation Directive and Framework Decision with the Migrant Smuggling Protocol, while it is true that the Facilitators Package comply with the international standards, the Protocol is generally considered to be more favourable for NGOs and people who assist migrants and asylum-seekers[47]. Some authors, such as Peers, believe that the provisions in the Facilitation Directive and Framework Decision «rather than reinforcing the [Protocol], detract from it through a lack of clarity and precision»[48]. There are three specific differences between the Migrant Smuggling Protocol and the two EU instruments that support this negative evaluation and which we are going to elaborate on below[49].

Firstly, the Protocol clearly defines migrant smuggling as involving a profit element[50], while the Facilitation Directive and Framework Decision do not define it at all and are only broadly applicable to "any person"[51] involved in assisting irregular migration.

Secondly, the savings clause in the Protocol is more comprehensive[52], covering not only refugee law but also international human rights law as it applies to all individuals, not

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[42] COUNCIL OF THE EUROPEAN UNION, *Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence*, in OJ L 328, 5.12.2002, pp. 17–18, at Art. 5; COUNCIL OF THE EUROPEAN UNION, *Council framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence*, in OJ L 328, 5.12.2002, pp. 1–3, at Art. 10.

[43] COUNCIL OF THE EUROPEAN UNION, *Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence*, in OJ L 328, 5.12.2002, pp. 17–18, at Art. 4(1); COUNCIL OF THE EUROPEAN UNION, *Council framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence*, in OJ L 328, 5.12.2002, pp. 1–3, at Art. 9.

[44] EUROPEAN UNION, *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, signed at Lisbon, 13 December 2007, entered into force Dec.1, 2009 OJ C 306, 17.12.2007, pp. 1-271.

[45] The operation of the Directive was considered by the Court of Justice in *Minh Khoa Vo*, Case C-83/12 PPU, 10 April 2012, ECLI:EU:C:2012:202).

[46] See E. PEERS, D. ACOSTA ARCARAZO, V. MORENO-LAX, E. GUILD, K. GROENENDIJK, *EU Immigration and Asylum Law: Text and Commentary: Second Revised Edition, Volume 2, EU Immigration Law*, 2012, (Martinus Nijhoff), Boston, p. 385; and A.T. GALLAGGHER, F. DAVID, *The International Law of Migrant*, cit., p. 398.

[47] A.T. GALLAGGHER, F. DAVID, *The International Law of Migrant*, cit., p. 91 ss.

[48] E. PEERS, D. ACOSTA ARCARAZO, V. MORENO-LAX, E. GUILD, K. GROENENDIJK, *EU Immigration and Asylum Law: Text and Commentary: Second Revised Edition, Volume 2, EU Immigration Law*, 2012, (Martinus Nijhoff), Boston, p. 389 ss.

[49] A.T. GALLAGGHER, F. DAVID, *The International Law of Migrant,* cit., pp. 91-92.

[50] Article 3(a) of *Migrant Smuggling Protocol.*

[51] Article 1(a)(b) of *Facilitation Directive.*

[52] According to Article 19(1) of *Migrant Smuggling Protocol*: «Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of nonrefoulement as contained therein».

just refugees and asylum-seekers. In contrast, the Framework Decision's savings clause[53] only refers to refugee law.

Thirdly, the Protocol makes it clear that smuggled migrants should not be subject to criminalisation under its provisions[54], while there is no equivalent provision in the Facilitation Directive or Framework Decision.

Moving away from the differences with the Migrant Smuggling Protocol and focusing on the weaknesses of the European Union regulation that have been pointed out, refugee and human right advocates have significantly criticised the Facilitators Package[55]. According Allsop & Manieri[56] «the tension between the criminalisation of people smuggling and those providing humanitarian assistance is a by-product of the Facilitation Directive and the Council Framework Decision implementing it». However, we have to keep in mind that, despite of the weaknesses that we are going to explain right below, the Facilitators Package regulates just minimum standards regarding migrant smuggling and the EU Member States are able to improve those grants in their domestic law.

On one hand, the savings clause[57] of the Framework Decision is narrow and rather oddly worded, stating that «it shall apply without prejudice to the protection afforded refugees and asylum seekers in accordance with international law of refugees or the other international instruments relating to human rights». The wording of the Framework Decision leaves it uncertain whether the commitment to international instruments on human rights applies to smuggled migrants who are not seeking asylum or refugee status. While it is unlikely that States could use this omission as an excuse to avoid their obligations, the impact of this omission should not be underestimated[58]. However, in theory the Framework Decision seems to respect the rights guaranteed for asylum seekers. Regarding to those rights, the European Union endeavours to establish a unified policy on asylum, subsidiary protection, and temporary protection for non-European nationals who require international protection. This policy aligns with the Geneva Convention[59] relating to the Status of Refugees and its Protocol[60], and seeks to uphold the principle of non-refoulement. Although the TFEU[61] and EU Charter of Fundamental Rights[62] do not provide definitions for "asylum" or "refugee", both documents reference the Geneva Convention and its Protocol.

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[53] According to Article 6 of the *Framework Decision*: «This framework Decision shall apply without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights, in particular Member States' compliance with their international obligations pursuant to Articles 31 and 33 of the 1951 Convention relating to the status of refugees, as amended by the Protocol of New York of 1967».

[54] According to Article 6 of *Migrant Smuggling Protocol*: «Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in Article 6 of this Protocol».

[55] A.T. GALLAGGHER, F. DAVID, *The International Law of Migrant*, cit., p. 392.

[56] J. ALLSOP, M. MANIERI, *The EU anti-Smuggling Framework: Direct and indirect effects on the provision of humanitarian assistance to irregular migrants*, in S. CARRERA, E. GUILD (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings, Policy Dilemmas in the EU,* 2016, p. 83.

[57] Article 6 of the Framework Decision 2002/946/JHA.

[58] T. GALLAGGHER, F. DAVID, *The International Law of Migrant Smuggling,* Cambridge, 2014, p. 90.

[59] UN GENERAL ASSEMBLY, *Convention Relating to the Status of Refugees*, 28 July 1951, entry into force: 22 April 1954, United Nations, Treaty Series, vol. 189, p. 137.

[60] UN GENERAL ASSEMBLY, *Protocol Relating to the Status of Refugees*, done 31 January 1967, entered into force 4 October 1967, United Nations, Treaty Series, vol. 606, p. 267.

[61] EUROPEAN UNION, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, OJ L. 326/47-326/390. Article 78(1).

[62] EUROPEAN UNION, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02. Article 18.

With this in mind, the EU stablished a Common European Asylum System (CEAS), which goal is to offer a high level of protection and respect for the rights of asylum seekers, and to contribute to the EU's objective of creating an area of freedom, security, and justice for those who seek protection within the Union, in accordance with the TFEU and TUE[63].

On the other hand, Article 1(2) of the Facilitation Directive[64] allows EU Member States to opt not to criminalise facilitation activities that are considered "humanitarian" in nature. This exception is not mandatory and its implementation is left to the discretion of the authorities of each EU Member State. A handful of Member States, such as Spain[65] and Greece[66], have chosen to adopt this exception. However, the Facilitation Directive does not provide a definition of what constitutes "humanitarian" assistance, leaving it up to Member States to interpret this concept[67].

The European Union institutions are aware of the weaknesses of the community legislation relating migrant smuggling. In 2015, the European Commission introduced an action plan against migrant smuggling (2015-2020)[68]. In accordance with this plan, in 2017,

[63] COUNCIL OF THE EUROPEAN UNION, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)* OJ L 337, 20.12.2011, pp. 9-26 (Qualification Directive); *Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast)* OJ L 180, 29.6.2013, pp. 1-30 (Eurodac Regulation); *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)* OJ L 180, 29.6.2013, pp. 31-59 (Dublin III Regulation); *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)* OJ L 180, 29.6.2013, pp. 96-116 (Reception Condition Directive); *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)* OJ L 180, 29.6.2013, p. 60-95 (Asylum Procedure Directive); and, *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof* OJ L 212, 7.8.2001, pp. 12-23 (Temporary Protection Directive).

[64] According to Article 1(2) of the *Facilitation Directive*: «Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned».

[65] Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, BOE-A-2000-544 (Organic Law 4/2000, of 11 January, on rights and freedoms of foreigners in Spain and their social integration). See Article 54(3) listing "very serious infractions": «That established in preceding articles notwithstanding, it shall not be considered an infraction to transport into Spanish territory a foreign national who, having presented without delay a request for asylum, has had this admitted for processing».

[66] See the Immigration Act, Article 88(6).

[67] J. ALLSOP, M. MANIERI, *The EU anti-Smuggling Framework: Direct and indirect effects on the provision of humanitarian assistance to irregular migrants*, in S. CARRERA, E. GUILD (eds.), *Irregular Migration, Trafficking and Smuggling of Human Beings, Policy Dilemmas in the EU,* 2016, p. 84.

[68] EUROPEAN COMMISSION, *EU action plan against migrant smuggling (2015-2020)*, Brussels, 27.5.2015 COM(2015) 385/285 final. Available on: https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:52015DC0285&from=ES.

the Commission conducted the first thorough assessment of the Facilitators Package[69], which raised concerns about the possible criminalisation of humanitarian assistance. The evaluation points in particular on the perception of legal uncertainty and the lack of adequate communication between authorities and actors intervening on the ground. While it is true that the Commission does not see a need for reform of the Facilitators Package.

In 2018, the European Parliament passed a resolution[70] calling for the Commission to create guidelines to avoid the criminalisation of humanitarian aid. A hearing[71] was held on the matter in September of that year. As part of its New Pact initiative[72], the Commission released a communication[73] providing interpretation guidelines for the Facilitation Directive. The communication emphasised that rescuing individuals in distress at sea should not be considered a crime, but the Commission did not make any additional recommendations, leaving search and rescue operations to NGOs and private vessels. In 2021 after a public consultation[74], the Commission introduced a revised five-year action plan against migrant smuggling (2021-2025)[75], which aims to prevent the criminalisation of humanitarian aid and will include a 2023 report on the implementation of the Facilitators Package. For the time being, the European Commission still does not consider an introduction of mandatory clause to exempt the humanitarian aid.

However, in 2021, the same year the renew action plan was introduced, the UN High Commissioner for Human Rights emphasised the importance of the humanitarian exception at the global level. The Commissioner made a recommendation that the European Union and its Member States revise their legislation, specifically by implementing a requirement for a "financial or other material benefit" in order to classify "migrant smuggling" as a crime. Additionally, the recommendation included making sure there is an explicit provision that exempts humanitarian assistance provided by civil society organisations or individuals from criminalisation[76].

Consequently, the discretionary powers granted to Member States in the implementation of the Facilitators Package have resulted in significant variations in the way it is framed and implemented in national law among selected Member States, according to

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[69] REFIT, *Evaluation on the EU legal framework against facilitation of unauthorized entry, transit and residence: The Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA)*, SDW (2017) 117 final, Brussels, 22 March.

[70] EUROPEAN PARLIAMENT, *European Parliament resolution of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised* (2018/2769(RSP)) OJ C 118, 8.4.2020, pp. 130-132.

[71] The Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament organised a public hearing hold in Brussels on 27 September 2018 on "The Implementation of the Facilitation Directive and humanitarian assistance to irregular migrants". Video streaming of the hearing available on: https://multimedia.europarl.europa.eu/en/webstreaming?d=20180927&lv=ALL&view=day.

[72] EUROPEAN COMMISSION, *Communication on the New Pact on Migration and Asylum*, COM (2020), 609 final, 23 September 2020, p. 18.

[73] EUROPEAN COMMISSION, Communication from The Commission, *(2020/C 323/01) Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence* OJ C 323/1, 1st October of 2020.

[74] EUROPEAN COMMISSION, *Consultation on "Tackling migrant smuggling: is the EU legislation fit for purpose?"*. For more information there is a summary of the contributions of this consultation made by the Commission available on: https://home-affairs.ec.europa.eu/system/files/2020-09/20170321_summary_of_replies_en.pdf

[75] EUROPEAN COMMISSION, final Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, A renewed EU action plan against migrant smuggling (2021-2025) *1*, Brussels, 29 September 2021 COM (2021) 591.

[76] UN OHCHR, *Thematic Report on 'Lethal Disregard: Search and rescue and the protection of migrants in the central Mediterranean Sea'*, May 2021, p. 28.

the survey of its transposition into the law of selected Member States requested by the European Parliament[77]. These variations include whether facilitation is considered a civil or administrative crime, as well as differences in the wording and conditions for prosecution. While several Member States, including France, Germany, Italy, the Netherlands, Spain, and the UK, criminalise the facilitation of irregular entry, only Germany require that it be done for profit in order to be punishable.

Whether they consider it more or less appropriate, EU Member States are required to implement the Facilitators Package. As mentioned above, the Facilitators Package is part of the European Union Law (the "EUL") and compliance with it is subject to scrutiny by the Court of Justice of the European Union.

We can find a few jurisprudential developments at National Courts in the EU following the adoption of the Migrant Smuggling Protocol and the Facilitation Directive regarding the abovementioned criminalisation of these society civil actors[78]. For instance, the case of the *French Farmer Cédric Herrou* held before the French Constitutional Council[79] and the case of the *Sea Watch 3* from the Italy Supreme Court[80]. In both cases, courts protect humanitarian aid through different arguments.

The CJEU has also ruled on the criminalisation of humanitarian aid by the end of 2021, namely in case C-821/19[81]. Following the introduction of Paragraph 353/A in its Criminal Code, Hungary began to criminalise anyone who carried out an organisational activity with the intention of starting an international protection procedure for asylum seekers, even if they knew that the application had no prospect of success. This situation led the Commission to address an infringement action against Hungary against the adopted Hungarian legislation known as "Stop Soros". We will analyse the response from the CJEU in the following pages.

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77 S. CARRERA, *Fit for Purpose? The Facilitation Directive,* cit.

78 See G. BEVILACQUA, *Humanitarian Smuggling: Setting Borders between Acts of Criminality and Acts of Solidarity with People on the Move,* on-line in *Ordine internazionale e diritti umani (OIDU)* (on-line), 2021, p. 1267 ss.

79 FRENCH CONSTITUTIONAL COUNCIL, decision No. 2018-717/718, of July 2018. Cédric Herrou was an olive farmer in southern France who helped about 200 migrants cross the border from Italy. He had been charged with 'facilitation of irregular entry', and sentenced to 4 months prison. France's Constitutional Council said Herrou's actions were not a crime under the "principle of fraternity" as enshrined in France's motto "Liberty, Egality, Fraternity." The decision made by the French Court recognised the constitutional importance of the third principle of the French Republican motto, fraternity. The ruling clarified the meaning of fraternity, linking it to solidarity, and limiting the scope of the offence of 'facilitating illegal entry, circulation, and residence of immigrants' in France. As a result of this ruling, the French Constitutional Council prompted the legislature to partially revise the *Code de l'entrée et du séjour des étrangers et du droit d'asile*, which had previously defined the *délit de solidarité* as a criminal offence for anyone who directly or indirectly aided the illegal entry, circulation, or residence of a foreign national in France, resulting in both penal and administrative penalties (the sanction was 5 years of prison and a fine of 30,000 €).

80 SUPREME COURT OF CASSATION (Sec. III, pen), judgment of 16 January 2020, No. 6626. The Italian Supreme Court has upheld the pre-trial judge's decision to reject the validity of the arrest of the German shipmaster from the Dutch non-governmental vessel. The shipmaster was detained for allegedly 'facilitating the entry' of rescued migrants and refugees into Italian territorial waters despite explicit orders from Italian enforcement authorities to the contrary. The Italian Supreme Court ruled that the shipmaster's arrest was not justified. This was because the shipmaster's responsibility could be exempted by Article 51 of the Italian criminal code, which includes a justification clause for fulfilling a legal obligation. In this specific case, the legal obligation was the duty of solidarity with people in distress at sea. In relation to the duty to rescue at sea, Italy is part of the UN Convention on the Law of the Sea, 10 December 1982, entered into force 16 November 1994, Art. 98.

81 CJEU, Case C-821/19, *European Commission v. Hungary*, Judgment (Grand Chamber), 16 November 2021, ECLI:EU:C:2021:390.

3. *The posture of the Court of Justice of the European Union*

Hungary's failure to comply with the correct application of the CEAS is nothing new. In 2020, in Case C-808/18 *Commission v. Hungary (reception of applicants for international protection)*[82], the CJEU concludes that the Hungarian legislative and administrative practice constitutes a flagrant breach of three directives adopted pursuant to shared competence concerning the common asylum policy - Directives 2013/32/EU (Asylum Procedure Directive) and 2013/33/EU (Reception Condition Directive) - and the common immigration policy - Directive 2008/115/EC (Return Directive)[83] - provided for in Arts. 78 and 79 TFEU, respectively[84].

Nor is this the first time that the Hungarian Government has persecuted humanitarian aid NGOs and the CJEU has put a stop to it. In the Case C-78/18 *Commission v Hungary (Transparency of Associations)*[85], the Grand Chamber of the Court of Justice upheld an action for failure to fulfil obligations brought by the European Commission against Hungary. The Court has held that, by imposing registration, reporting and publicity obligations on certain categories of civil society organisations which directly or indirectly receive aid from abroad in excess of a certain amount, and by providing for the possibility of applying penalties to organisations which fail to comply with those obligations, Hungary has introduced discriminatory and unjustified restrictions both in respect of the organisations concerned and in respect of the persons who grant them that aid. Those restrictions are contrary to the Member States' obligations under the free movement of capital laid down in Article 63 of the TFEU[86] and Articles 7, 8 and 12 of the EU Charter of Fundamental Rights[87], concerning

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[82] CJEU, Case C-808/18, *Commission v. Hungary (reception of applicants for international protection),* Judgment, 17 December 2020, ECLI:EU:C:2020:1029. The circumstances in which the Commission imposes an action for failure to fulfil obligations before the CJEU are because Hungary responded to the migration crisis and the influx of international protection applicants by modifying its legislation on the right to asylum and the return of illegally staying third-country nationals. One of the changes implemented in a 2015 law was the establishment of transit zones at the Serbian-Hungarian border, where asylum procedures are conducted. The law also introduced the concept of a "crisis situation caused by mass immigration", which permits the government to apply derogatory rules disguised as general rules. In 2017, another law expanded the circumstances under which a crisis situation may be declared and revised the provisions allowing for derogation from the general rules.

[83] COUNCIL OF THE EUROPEAN UNION, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals* OJ L 348, 24.12.2008, pp. 98-107. (Return Directive).

[84] See J. FERRER LLORET, *La Unión Europea ante el derecho de asilo: A propósito de la sentencia Comisión /Hungría (Acogida de solicitantes de Protección Internacional),* in *Rev. der. com. eur.,* 2021, pp. 25-66.

[85] CJEU, Case C-78/18, *Commission v Hungary (Transparency of Associations*), Judgment, 18 June 2020, ECLI:EU:C:2020:476.

[86] According to Article 63 of *TFEU*: «(1). Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited. (2). Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited».

[87] According to Article 7 of the *Charter of Fundamental Rights of the European Union* on Respect for Private and Family Life: «Everyone has the right to respect for his or her private and family life, home and communications». According to Article 8 on Protection on Personal Data: «(1). Everyone has the right to the protection of personal data concerning him or her. (2). Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. (3). Compliance with these rules shall be subject to control by an independent authority». According to Article 12 on Freedom of Assembly and of Association: «(1). Everyone has the right to freedom of peaceful

the right to respect for private and family life, the right to the protection of personal data and the right to freedom of association[88].

We will now centre our attention on a particular case that is directly related to the smuggling of migrants and asylum seekers. This case began on June 20, 2018, when the Hungarian Parliament approved a series of legislative measures ostensibly designed to address the issue of illegal immigration into Hungary[89].

The Hungarian Government referred to these measures as the "STOP Soros Act Package"[90]. The proposals were named after George Soros, a Hungarian-American businessman and his philanthropic organisation, the Open Society Foundations. The foundation is recognised as the "world's largest private funder of independent groups working to promote justice, democratic governance, and human rights"[91].

Following a visit to Hungary in 2019, the United Nations High Commissioner expressed his concern about the criminalisation of assistance to irregular migrants and applicants for international protection and considered it to be inconsistent with the compatible with obligations under international law[92].

The Commission stated its opinion on 24 January 2019, asserting that Hungary did not fulfil its duties under various articles of the CEAS, including Article 8(2)[93], Article 12(1)(c)[94],

assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests. (2). Political parties at Union level contribute to expressing the political will of the citizens of the Union».

88 See CJEU, *The restrictions imposed by Hungary on the financing of civil organisations by persons established outside that Member State do not comply with EU law Judgment in Case C-78/18 Commission v Hungary*, in *Curia Press Release* No 73/20 Luxembourg, 18 June 2020, p. 1.

89 M. DUNAI, *Hungary approves 'STOP Soros' law, defying EU, rights groups*, in *Reuters*, 20 June 2018. Available on: https://uk.reuters.com/article/uk-hungary-soros/hungary-approves-stop-soros-law-defying-eu-rightsgroups-idUKKBN1JG1V1.

90 See generally, THE INTERNATIONAL SERVICE FOR HUMAN RIGHTS (ISHR), *Observations Relating to Case C-821/19 Commission v Hungary,* 2021, p. 3.

91 Open Society Foundations, *Who we are.* Available on: https://www.opensocietyfoundations.org/wh-owe-are.

92 F. GONZÁLEZ MORALES, *End of visit statement of the UN Special Rapporteur on the human rights of migrants*, 2019. Available on: https://www.ohchr.org/en/statements/2019/07/end-visit-statement-un-special-rapporteur-human-rights-migrants-felipe-gonzalez.

93 According to Article 8(2) of *Asylum Procedure Directive* on information and counselling in detention facilities and at border crossing points: «Member States shall ensure that organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders. Member States may provide for rules covering the presence of such organisations and persons in those crossing points and in particular that access is subject to an agreement with the competent authorities of the Member States. Limits on such access may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not thereby severely restricted or rendered impossible».

94 According to Article 12(1)(c) of *Asylum Procedure Directive* on guarantees for applicants: «1. With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants enjoy the following guarantees: they shall not be denied the opportunity to communicate with UNHCR or with any other organisation providing legal advice or other counselling to applicants in accordance with the law of the Member State concerned».

Article 22(1)[95] and Article 33(2)[96] of Asylum Procedure Directive and under Article 10(4)[97] of Reception Condition Directive.

The action brought by the Commission against Hungary is based on three arguments. First, in addition to the grounds explicitly stated in the Asylum Procedure Directive, Hungary has implemented a new basis for considering asylum applications inadmissible. Secondly, the activity of providing assistance to applicants whose asylum applications are inadmissible as a result of the above-mentioned restrictions is prohibited. The third ground put forward by the Commission is related to the restrictions imposed on persons prosecuted or convicted for the crime of facilitating irregular immigration[98].

The newness of the judgment on which the following sections are based lies in the fact that it is the first time that the CJEU has ruled on the use of criminal law to restrict access to asylum in Hungary[99].

3.1. *Member States may not add a new ground of inadmissibility of applications for asylum to those expressly set out in Directive 2013/32*

This part of the judgment is not ground-breaking in the sense that the CJEU had already ruled on the violation of EUL of this new admissibility criterion. Before the present case the CJEU made a ruling on the legality of an admissibility criterion under EUL, in response to a request for a preliminary ruling from the Budapest Administrative and Labour Court. The case, *LH v Bevándorlási és Menekültügyi Hivatal*[100], centered around the question of whether the admissibility criterion was compatible with EUL. CJEU ruled that the admissibility criterion violated the Asylum Procedure Directive, as it could not be justified

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[95] According to Article 22(1) of *Asylum Procedure Directive* on the right to legal assistance and representation at all stages of the procedure: «1. Applicants shall be given the opportunity to consult, at their own cost, in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their applications for international protection, at all stages of the procedure, including following a negative decision».

[96] According to Article 33(2) of *Asylum Procedure Directive* on causes to consider an application for international protection as inadmissible: «(a) another Member State has granted international protection; (b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35; (c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38; (d) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU have arisen or have been presented by the applicant; or (e) a dependant of the applicant lodges an application, after he or she has in accordance with Article 7(2) consented to have his or her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependant's situation which justify a separate application».

[97] According to Article 10(4) of *Reception Condition Directive* on conditions of detention: «Member States shall ensure that family members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy. Limits to access to the detention facility may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely restricted or rendered impossible».

[98] L. PASCUAL MATELLÁN, *La Criminalización de la asistencia a los solicitantes de Asilo en Hungría (a propósito de la sentencia Comisión/Hungría, C-821/19)*, in *Rev. der. com. eur.*, 2022, pp. 169-187.

[99] L. PASCUAL MATELLÁN, *La Criminalización de la asistencia,* cit., p. 172.

[100] CJEU, Case C-564/18, *LH v Bevándorlási és Menekültügyi Hivatal*, Judgment, 19 March 2020, ECLI:EU:C:2020:218.

under any of the grounds for declaring an application for international protection inadmissible as outlined in Article 33(2) of the Directive.

In a subsequent case, *FMS, FNZ, SA and SA junior v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*[101], the CJEU reaffirmed its position and took it a step further by stating that applicants who were rejected based on the new admissibility criterion must be allowed to submit a new asylum application without facing negative consequences associated with the next applications.

In the context of "Stop Soros Package", Article XIV of Hungary's Fundamental Law underwent changes, including the addition of Section (4), which states that individuals who are not Hungarian nationals are not eligible for asylum if they entered Hungary through a country where they were not persecuted or directly threatened with persecution[102].

Additionally, Section 51(2) of the Asylum Act was amended to include a new subsection (f) that renders an asylum application inadmissible if the applicant arrived in Hungary through a country that did not subject them to persecution or serious harm, as defined in Subsections (1) of Sections 6 and 12, or if the country provides sufficient protection[103].

These amendments introduce the new admissibility criterion. Thus, according to this new criterion introduced by the Hungarian Law, an application for international protection must be considered inadmissible when the applicant has arrived through a country where he/she would not be exposed to persecution or where an adequate level of protection is granted.

The CEAS establishes in its Article 33 of the Asylum Procedure Directive an exhaustive list of grounds on which States must base their refusal to accept applications for international protection.

Hungary argues that its new inadmissibility criterion is in line with the "safe third country" ground contained in the exhaustive list of inadmissibility criteria set in Article 33 of the Asylum Procedure Directive. However, Article 38(2)(a) of the Asylum Procedure Directive establishes the conditions for the transposition by the Member States of the concept of first country of asylum or safe third country[104].

As claimed by the CJEU, Article 38(2)(a) of the Asylum Procedure Directive stipulates that the applicant for international protection must have a "connection" with the third country in question, which makes it reasonable for them to relocate to that country[105].

So, just transiting through the territory of a third country cannot be considered as a "connection" with that country, as defined by Article 38(2)(a) of the Asylum Procedure Directive, between the applicant for international protection and that third country[106].

The inadmissibility ground failed to satisfy the requirements for the transposition of "safe third country" concept set in Article 38(2), specifically those referred to paragraph (a).

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101 CJEU, Joined Cases C-924/19 PPU and C-925/19 *PPU, FMS, FNZ, SA and SA junior v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, Judgment, 14 May 2020, ECLI:EU:C:2020:367, paras. 148-165.

102 HUNGARIAN MINISTRY OF JUSTICE, Official translation of the Fundamental Law of Hungary, Article XIV (4). Available on: http://njt.hu/translated/doc/TheFundamentalLawofHungary_20191213_FIN.pdf.

103 HUNGARIAN HELSINKI COMMITTEE, Unofficial Translation of Bill T/333, Section 7. Available on: https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf.

104 CJEU, Case C-821/19, *European Commission v Hungary*, Judgment (Grand Chamber), 16 November 2021 ECLI:EU:C:2021:390, par. 30.

105 *Ibid.*, par. 36.

106 *Ibid.*, par. 38.

In conclusion, between the amendments, the criteria introduced in the Hungarian Law for considering asylum applications inadmissible if a requester arrives at the Hungarian border through a country where they did not face persecution or serious harm, or where adequate level of protection is guaranteed violates EUL.

3.2. *Member States may not criminalise organising activity of facilitating the lodging of an asylum procedure*

EU Member States have a duty, according to the Asylum Procedure Directive and Reception Condition Directive, to create and uphold a legal structure that guarantees human rights defenders can perform their work, communicate with asylum seekers, and provide them with the required information and assistance. This framework is implemented to safeguard the rights of asylum seekers during the entire asylum process[107]. *Inter alia*, EU Member States are responsible for creating and maintaining a legal framework that enables asylum seekers to: (a) communicate with the United Nations High Commissioner for Refugees (UNHCR) or any other organisations that provide legal advice or counselling to applicants[108]; (b) allows those providing advice and counselling to have easy access to applicants who are at border crossing points, including transit zones[109]; (c) ensures that basic legal assistance is provided to asylum seekers, including access to legal advisers in closed areas such as detention facilities and transit zones. Additionally, guarantees the right of asylum seekers to consult (at their own cost) a legal advisor or counsellor at all stages of the asylum procedure[110]; (d) have access to information about organisations and groups that are able to provide legal assistance, or inform them about the reception conditions[111].

The Commission took action against Hungary for its failure to fulfil obligation under these provisions of the EUL.

Hungary has justified the implementation of this regulation by claiming that while it was not intended to transpose the Facilitation Directive into national law, the paragraph in the Criminal Code was enacted with the aim of fulfilling the objectives of the Facilitation Directive. The goal was to prevent criminal behaviour that was not covered by the directive when it was adopted, but is closely linked to the behaviour described in Article 1 of the Facilitation Directive[112].

The CJEU examines, first, whether that provision of the Hungarian Criminal Law represents a "restriction" on the entitlements granted by the Asylum Procedure Directive and Reception Condition Directive and, if so, second, whether such a "restriction can be justified under EUL" that fight against the assistance of misuse of the asylum procedure and which fight against the illegal immigration based on deception[113].

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[107] See generally, THE INTERNATIONAL SERVICE FOR HUMAN RIGHTS (ISHR), *Observations Relating to Case C-821/19,* cit., p. 21.
[108] *Asylum Procedure Directive*, Article 12(1)(c).
[109] *Asylum Procedure Directive*, Article 8(2).
[110] *Asylum Procedure Directive*, Articles 19-25.
[111] *Reception Condition Directive*, Article 5(1).
[112] CJEU, Case C-821/19, *European Commision v Hungary*, Judgment (Grand Chamber), 16 November 2021 ECLI:EU:C:2021:390, paras. 68.
[113] *Ibid*., par. 72.

The CJEU points out that the applicability of the offence under the Hungarian Code is based on three constituent elements[114]: the stage before submit the asylum application, the organising activity and the intentional element.

The firs element has to do with the "moment" when the offence is committed. It follows from the phrasing of this stipulation that the offender's aid must have the purpose of facilitating the initiation of an asylum process in Hungary. So, the scope of application of this provision is limited only to the stages of the asylum process prior to the submission of the asylum application. Given the evidence presented to the CJEU, it can be concluded that the aforementioned provision does not constitute a basis for the prosecution of an individual who aids an asylum seeker once their application has been submitted under Articles 6(2) to (4) of Directive 2013/32[115].

Despite this, the CJEU highlights that the actions mentioned to in Article 8(2) and Article 22(1) of Directive 2013/32 and Article 10(4) of Directive 2013/33 are activities that take place before an application for international protection is filed, and thus may fall under Paragraph 353/A (1) of the Criminal Code[116].

On the contrary, this is not the case for the activities alluded to in Article 12(1)(c) of Directive 2013/32. Indeed, the language used in that provision clearly implies that it is only relevant to the outlined in Chapter III of the said directive, which specifically pertain to the stage of the actual evaluation of the asylum request[117].

The second constituent element to be provided is the context of the "organising activity". Hungary in its pleadings says that the concept of "organisation" refers to a behavioural pattern aimed at achieving a concerted and specific objective[118].

The Commission has stated that the wide application of Paragraph 353/A of the Criminal Code to almost any organisation, volunteer or legal advisor that is involved in organising activities, in practice, means that these entities risk criminal prosecution, which in turn makes it highly unlikely for organisations and people that provide advice and guidance to asylum seekers at border crossing points and transit zones to access them[119].

Both, the Advocate General in his Opinion[120] and the CJEU, echo the line of argumentation of the Commission. The Asylum Procedure Directive, as well as the Reception Condition Directive, provide specific organisations with the privilege to visit individuals who have applied for international protection and are either located at the external borders of the Member States or detained within their territory. In essence, the activity of these organisations is by nature subject to a certain degree of coordination in order to achieve a concerted and specific objective. In light of this, the aid given to these asylum seekers by members of these organisations should be considered as an organisational undertaking as defined by Article 353/A(1)(a)[121].

Thirdly, the crime defined in Article 353/A, paragraph 1, letter a), implies an "intentional" element. Hungary has highlighted that for this offence to be proven, the

114 *Ibid.*, par. 74.
115 *Ibid.*, paras. 77-78.
116 *Ibid.*, par. 79.
117 *Ibid.*, par. 81.
118 *Ibid.*, par. 65.
119 *Ibid.*, par. 55.
120 CJEU, Case C-821/19, *European Commission v Hungary*, Opinion of Advocate General Rantos, 25 February 2021, ECLI:EU:C:2021:143, par. 39.
121 CJEU, Case C-821/19, *European Commision v Hungary*, Judgement (Grand Chamber), 16 November 2021 ECLI:EU:C:2021:390, par. 87.

Hungarian authorities must demonstrate with a high degree of certainty that the individual who provided assistance was conscious of the fact that the individual they aided did not meet the eligibility criteria for asylum under Hungarian law. As recognised by the *Alkotmánybíróság* (Hungarian Constitutional Court)[122], Article 353/A does not sanction altruistic behaviour that meets the requirement of helping people in need and lacking resources.

The Advocate General in his Opinion points out a very interesting argument that it seems quite decisive. He says that: «…in principle, any organisation or person wishing to provide assistance necessarily acts with the intention of enabling the person being assisted to initiate asylum proceedings and may, at the very least, have doubts as to whether or not that person meets the requirements to be eligible for international protection. Doubts as to the veracity of applicants' claims are inherent in the asylum procedure, which is conducted precisely with the aim of establishing whether the conditions for the granting of international protection are satisfied. It is for the competent national authorities, and not legal advisers or organisations or persons offering assistance to applicants for international protection, to assess whether the reasons given in the application justify international protection being granted in accordance with the conditions imposed by the national legislation»[123].

The CJEU does not echo the argument given by the Advocate General but it does point out that the interpretation by the Hungarian Constitutional Court does not protect those who provide assistance to asylum seekers in exchange for payment, as is the case of a legal advisor for example. This situation would contravene what is guaranteed by the Article 22(1) of the Asylum Procedure Directive which is applicants' right to consult a legal adviser or other adviser only at their own expenses.

Finally, the CJEU emphasises that although no criminal conviction has been based on this provision, criminal proceedings have been initiated on the basis of it. The implementation of such criminal sanctions certainly has a significant dissuasive impact[124], which may cause those who intend to aid third-country nationals or stateless individuals seeking refugee status in Hungary to abstain from engaging in the support activities governed by the asylum law provisions of the Union.

Regarding the possible justification for restrictions, as to whether Article 353/3(a) of the Criminal Code constitutes an appropriate measure to combat fraudulent or abusive practices, the CJEU states that the potential for someone to be found guilty of a criminal offence solely due to their knowledge that their asylum application would be unsuccessful raises doubts about the legality of any aid given to complete the critical steps of the asylum application process, such as filing and submitting the application. This is especially true for Paragraph 353/A(1)(a) of the Criminal Code, which imposes a severe penalty of imprisonment for such an offence[125].

From the findings of the CJEU it follows that this provision of the Hungarian Criminal Code «goes beyond what may be regarded as necessary to attain the objective of preventing fraudulent or abusive practices»[126].

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[122] Hungarian Constitutional Court, Sentence 25 February 2019, Decision no. 3/2019 (III. 7.)
[123] CJEU, Case C-821/19, *European Commission v Hungary*, Opinion of Advocate General Rantos, 25 February 2021, ECLI:EU:C:2021:143, par. 34.
[124] CJEU, Case C-821/19, *European Commission v Hungary*, Judgement (Grand Chamber), 16 November 2021 ECLI:EU:C:2021:390, par. 98.
[125] *Ibid.*, par. 134.
[126] *Ibid.*, par. 133.

Regarding the goal of fighting deceptive-based illegal immigration, it should be noted that Paragraph 353/A(1)(a) of the Criminal Code is not an effective measure for achieving such an objective.

In this regard, it must be remembered the abundant jurisprudence of the CJEU on this matter that says[127]: «…Any third-country national or stateless person has the right to make an application for international protection on the territory of a Member State, including at its borders or in its transit zones, even if he or she is staying illegally in that Member State». The CJEU highlights that this entitlement must be acknowledged, regardless of the likelihood of such a claim being successful[128].

According to the CJEU, a third-country national or stateless person who simply applies for international protection cannot be deemed to have violated the Facilitators Package concerning irregular entry and residence in the territory of the relevant Member State. As a result, individuals or organisations that only assist such individuals in submitting an asylum application with the appropriate national authorities, even if they are aware that the application is unlikely to succeed, cannot be equated with those who aid irregular entry, movement, and residence, as outlined in Article 1(1) of the Facilitation Directive[129].

The CJEU emphasises that this interpretation is supported by Article 6 of Framework Decision 2002/946, which explicitly affirms that the Facilitation Directive is applicable without prejudice to the safeguards provided to asylum seekers under international law[130]. These protections are guaranteed by the CEAS and include the Reception Condition Directive and the Asylum Procedure Directive, among others.

3.3. *Member States may not take restrictive measures against persons who have been accused or found guilty of such an offence*

The incorporation of the Section 353/A offence into Hungarian law was coupled with a modification to Chapter V of the country's Police Law, specifically Section 46/F[131], which mandates that any individual who is under investigation for purportedly committing the Section 353/A offence is automatically prohibited from being within eight kilometres of Hungary's borders.

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127 See, to that effect, CJEU, judgments of 25 June 2020, *Ministerio Fiscal (Authority likely to receive an application for international protection)*, C-36/20 PPU, EU:C:2020:495, par. 73, and of 17 December 2020, *Commission v Hungary (Reception of applicants for international protection*), C-808/18, EU:C:2020:1029, par. 96.

128 CJEU, Case C-821/19, *European Commission v Hungary*, Judgement (Grand Chamber), 16 November 2021, ECLI:EU:C:2021:390, par. 136.

129 *Ibid.*, par. 141.

130 *Ibid.*, par. 142.

131 The Amendment of Chapter V of Police Law, with the subheading: "Border security restraining measure", reads as follows: «Section 46/F. In order to ensure the unrestricted state border regime and the border surveillance activity, the police officer shall prevent a person from entering the territory of Hungary in accordance with the external border line as defined by point 2 of Article 2 of the Schengen Borders Code, or within an 8 km area of the border line, and order the person present there to leave, who is under criminal proceedings due to the criminal offence of the unlawful crossing of the border barrier (Criminal Code Section 352/A.), damaging the border barrier (Criminal Code Section 352/B.), the obstruction of the construction work on the border barrier (Criminal Code Section 352/C.), human smuggling (Criminal Code Section 353.), facilitating unlawful residence (Criminal Code Section 354.), facilitating illegal immigration (Criminal Code Section 353/A)».

Hungary argues is a necessary and justified measure for the maintenance of security and public order at border crossing points. Advocate General Rantos in this case is of the same opinion as Hungary[132]. In his opinion, Article 46/F of the Police Law, by itself, does not pose any concerns regarding compliance with EUL provisions. It is a valid implementation of a common practice where law enforcement authorities restrict access to "sensitive" areas, especially for individuals suspected of committing criminal acts in those locations or have the potential to reoffend[133].

However, in the specific situation in Hungary, applicants for international protection are forced to stay in transit zones such as Röszke and Tompa[134], located in the vicinity of the Hungarian-Serbian border. These areas were to be considered as detention centres within the meaning of the Reception Condition Directive.

It is for this reason that the CJEU has declared that the ban on individuals suspected of committing the offence from entering Hungary's borders, where asylum seekers normally apply for international protection, restricts the rights guaranteed under the relevant provisions. As this ban is implemented in order to enforce the new offence, which contravenes EUL, it cannot be justified[135].

4. *Implications of the jurisprudence*

The "Stop Soros Law" is an example of a government taking action to exert strict control over the actions of non-governmental organisations through nothing less than criminal law, which has been criticised by civil society as the criminalisation of actions of solidarity.

The ruling confirms that the "Stop Soros" laws implemented by Hungary are in contravention of EU regulations. As an outcome, Hungary is now required to revoke the sections which have been identified as breaking EUL.

However, the first reaction from Hungarian government spokesperson Zoltán Kovács was somewhat puzzling: «Hungary respected the CJEU's ruling regarding the Stop Soros package laws, but Hungary reserved the right to take action against foreign-funded NGOs, including any activities by organisations funded by George Soros seeking political influence or promoting migration»[136].

In the same vein, the response of Justice Minister, Judit Varga: «Hungary will continue to defend Europe, whether the Brussels bubble likes it or not»[137].

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132 CJEU, Case C-821/19, *European Commission v Hungary*, Opinion of Advocate General Rantos, 25 February 2021, ECLI:EU:C:2021:143, paras. 48-54.

133 *Ibid.*, par. 50.

134 See, to that effect, CJEU, judgment of 17 December 2020, *Commission v Hungary (Reception of applicants for international protection)*, C-808/18, EU:C:2020:1029, paras. 156-166.

135 CJEU, Case C-821/19, *European Commission v Hungary*, Judgement (Grand Chamber), 16 November 2021, ECLI:EU:C:2021:390, par.163.

136 Hungary's Stop Soros law that criminalises helping asylum seekers "infringes EU law". Available on: https://www.euronews.com/my-europe/2021/11/16/hungary-move-to-criminalise-support-of-asylum-seekers-infringes-eu-law.

137 Gov't to ECJ Ruling: We Will Prevent Hungary from Becoming 'Immigrant Country'. Available on: https://hungarytoday.hu/ecj-hungary-reactions-stop-soros-varga-kovacs/.

Based on the principle of EUL supremacy, Hungarian authorities, including those responsible for prosecution and judges, are compelled to reject the application and/or enforcement of those sections of Hungarian law that are inconsistent with EUL even before Hungary officially repeals the parts of its legislation that were identified as not being in conformity with EUL[138]. Therefore, it is theoretically possible for individuals or organisations providing aid and support to asylum seekers to do so without the danger of being charged with a crime. In the event that Hungary fails to adhere to the ruling, the Commission has the authority to request the CJEU to impose a lump sum or penalty payment[139], pursuant Article 260(2) of TFEU.

As we have said, this is not the first time that Hungary has been in the spotlight for its systematic violations of human rights. We should not forget that the European Parliament call on the Council[140] to activate the procedure of Article 7 of the TEU[141], dubbed the "nuclear option" in European circles. One of the European Parliament's concerns regarding the respect of the values of Article 2 TEU in Hungary was the fundamental rights of migrants, asylum seekers and refugees[142]. Accordingly, the Council has so far organised three hearings on Hungary within the framework of the General Affairs Council[143]. Although, to date, the Council has not found that there is a clear risk of a serious breach of Article 2 TEU by Hungary. This mechanism was not initially created with the aim of activating the strongest sanction against a state. Its aim is rather to push the state, through political pressure from its peers, to restore respect for European values[144] in the state and keep it in the European family. Article 7 TEU has proved to be a flawed instrument, however, as no progress has been made in the process. On the one hand, we can presume that this is because a good part of the Member States prefers to avoid having to judge one of their peers (everyone is afraid to press the button), and on the other hand, because unanimity is required to reach the

138 ISHR, *Judgment against Hungary in case C-821/19 Overview,* 2022. Available on: https://ishr.ch/wp-content/uploads/2022/02/Update-note-on-case-C-821_19.pdf.

139 The Commission could also have request the CJEU for interim measures and the imposition of a periodic penalty payment, in order to stop the application of the Hungarian "Stop Soros Law" as it did before in the *Commission v Poland (Bialowieza Forest)* case (Order of 20 November 2017, C-441/17 R, EU: C:2017:877) in which the CJEU warned Poland with the imposition of a periodic penalty payment of at least 100,000€ per day if it did not stop the felling of trees in that forest in breach of the Habitats Directive.

140 EUROPEAN PARLIAMENT, *European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded* (2017/2131(INL)).

141 According to Article 7(1) *TEU*: «On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply».

142 Recital E (1) of the *European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded* (2017/2131(INL)).

143 EUROPEAN PARLIAMENT, *European Parliament resolution of 5 May 2022 on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary* (2022/2647(RSP)).

144 Referred to in Article 2 *TEU*: «The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail».

ultimate consequences of Article 7[145], which can withdraw voting rights in the Council from a Member that is attacking European values.

However, following the judgement of the CJEU of 16 February[146], the European Commission was no longer prevented from activating another instrument to protect the rule of law, which Poland and Hungary had hitherto called into question. This is the regulation on the general conditionality regime for the protection of the Union's budget, a rule of law mechanism[147] (the "Conditionality Regulation"), which is intended to complement the abovementioned procedures provided for in Article 7 TEU. This instrument is used by the EU to sanction Member States if they deviate from the fundamental values of the European Union and the principles of the rule of law. In fact, the Council has put this mechanism into effect whit the adoption of the Council Implementing Decision (EU) 2022/2506, of 15 December 2022, on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary[148]. The budgetary impact of this suspension amounts to approximately €6.3 billion in budgetary commitments[149]. The European Commission's rule of law country report on Hungary of 2022[150] mentioned restrictions on the work of NGOs and states that: «Hungary's failure to implement this judgment maintains the pressure on CSOs active in the field of asylum». However, neither in the definition of the "rule of

[145] The ultimate consequences of this procedure are referred in Article 2 and 3 *TEU*: «2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations; 3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State».

[146] CJEU, Case C-156/21, *Hungary v Parliament and Council*, Judgment of the Court (Full Court) 16 February 2022 ECLI:EU:C:2022:97; and CJEU, case C-157/21, *Poland v Parliament and Council*, Judgment of the Court (Full Court) of 16 February 2022, ECLI:EU:C:2022:98.

[147] Officially known as *Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget* OJ L 433I, 22.12.2020, pp. 1-10. (The Conditionality Regulation). With this Regulation, which entered into force on January 1, 2021, a link is established between the investments of the Union budget and the violation of the principles of the rule of law in the Member States.

[148] COUNCIL OF THE EUROPEAN UNION, *Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary* OJ L 325, 20.12.2022, pp. 94-109.

[149] COUNCIL OF THE EUROPEAN UNION, Press release, *Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary,* 12 December 2022. Available on: https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/.

[150] EUROPEAN COMMISSION*, 2022 Rule of Law Report Country Chapter on the rule of law situation in Hungary,* Luxembourg, 13.7.2022 SWD (2022) 517 final, p. 29.

law"[151] in the Conditionality Regulation, nor in the grounds[152] of the Council Decision to implement this mechanism against Hungary is there any reference to the rights of migrants, asylum seekers or refugees. For the time being, it seems that the European Institutions do not consider the violation of the rights of this group of people to be a ground for breaching the rule of law and consequently not a reason for sanctioning Member States through this mechanism[153].

It would seem, though, that if any institution has always been willing to go to the rescue of the rule of law, it has been the CJEU[154]. Jurisprudence such as the one we have just analysed makes this clear. That although European legislation is sometimes not as guaranteeing as it could be, due to the will of its Member States, the CJEU is going to ensure that at least these minimum guarantees are complied with by them.

5. *Concluding remarks*

The relation between the CEAS and the criminalisation of humanitarian aid is a complex one. On the one hand, the CEAS aims to provide a high level of protection for asylum seekers and to ensure that their rights are respected. On the other hand, some Member States of the EU have enacted legislation criminalising the provision of humanitarian aid to irregular migrants, which includes asylum seekers.

In an effort to regain control and prevent the unchecked movement of refugees across the continent, Member States have implemented measures such as militarizing their borders

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[151] According to Article 2 of the *Conditionality Regulation*: «For the purposes of this Regulation, the following definitions apply: (a) 'the rule of law' refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU».

[152] About the grounds that constitute breaches of the principles of the rule of law in the *Council Implementing Decision (EU) 2022/2506,* see Recital (2): «On 27 April 2022, the Commission sent a written notification to Hungary pursuant to Article 6(1) of Regulation (EU, Euratom) 2020/2092 (the 'notification'). In the notification, the Commission raised its concerns and presented its findings regarding a number of issues related to the public procurement system in Hungary, including: (a) systemic irregularities, deficiencies and weaknesses in public procurement procedures; (b) the high rate of single bidding procedures and the low intensity of competition in procurement procedures; (c) issues related to the use of framework agreements; (d) the detection, prevention and correction of conflicts of interest; and (e) issues related to public interest trusts». And Recital (3): «Those issues and their repetition over time demonstrate a systemic inability, failure or unwillingness, on the part of the Hungarian authorities, to prevent decisions that are in breach of the applicable law, as regards public procurement and conflicts of interest, and thus to adequately tackle risks of corruption. They constitute breaches of the principles of the rule of law, in particular the principles of legal certainty and prohibition of arbitrariness of the executive powers and raise concerns as to the separation of powers».

[153] However, Recital (3) of the *Conditionality Regulation* states in its recitals that: «…The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union (the "Charter") and other applicable instruments». So, the rights of migrants, asylum seekers and refugees could be, in theory, presumed to be included in these fundamental rights when assessing the rule of law of any Member State.

[154] See generally M. J. CERVELL HORTAL, *Una unión de valores: ¿realidad o desiderátum? La protección del Estado de Derecho en el seno de la UE*, 2022.

and seas, as well as adopting policies of deterrence and deprivation. As a result, many individuals and organisations offering humanitarian aid have been criminalised for attempting to fill the gap left by a lack of official assistance[155].

It is important to note that humanitarian aid is a humanitarian act and not a crime. The criminalisation of humanitarian aid is a serious problem that limits the ability of people and organisations to aid those in need. It can discourage people from providing aid, even when they are in a position to do so, which can have serious consequences for people who depend on this aid to survive. The criminalisation of humanitarian aid can also violate the human rights of people who receive this aid, as they depend on it to meet their basic needs. In addition, it can undermine trust in institutions and the state and promote stigma and discrimination towards the most vulnerable groups. Besides that, the implementation of criminal penalties like this undoubtedly has a powerful deterrent effect, which, as demonstrated in the case of Hungary, may cause individuals who intend to support third-country nationals or stateless persons seeking refugee status to abstain from engaging in the assistance activities governed by the provisions of the CEAS.

The approach through which the Commission and the CJEU have rejected the Stop Soros Law, which criminalised the humanitarian aid, is due to the guarantees offered by the CEAS and the protection provided by the Facilitators Package. These rights that are protected for asylum seekers must prevail when applying the Facilitators Package. However, what happens to those migrants who are not international protection applicants? The Facilitators Package does not address this, as the Migrant Smuggling Protocol does. Even though currently, the Commission is not considering a reform of the Facilitators Package.

Regarding the Facilitators Package and leaving aside the clarity of the CJEU that humanitarian aid cannot be criminalised when it acts in favour of asylum seekers, we consider that European legislation has ample room for improvement.

It is suggested that the EU Facilitators Package needs to undergo changes that align it with the Migrant Smuggling Protocol and the principles of the Lisbon Treaty. Even if it meets international standards, in order to enhance legal clarity and consistency across the EU, the Facilitators Package should function as a criminal justice instrument that clearly defines what constitutes criminal activity and what should be exempted from criminalisation[156].

Specifically, the definition of a base crime should include requirements for financial and other material benefit, including unjust enrichment, for facilitating entry, transit, stay, and residence[157].

Besides that, the discussions on the criminalisation of humanitarian actions often focus on the need to extend the concept of a "humanitarian exception" to include actions that are driven by a desire to provide aid and assistance to migrants, rather than facilitating illegal immigration through activities such as smuggling and trafficking[158]. In this sense, Article 1(2) of the EU Facilitators Directive should be amended to prevent the criminalisation of humanitarian assistance and misguided prosecutions of humanitarian actors, basic service providers, and human rights defenders. This could be achieved by defining "humanitarian

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155 F. WEBBBER, *The legal framework: when law and morality collide*, in *Humanitarianism: the unacceptable face of solidarity*, (Institute of Race Relations), London, 2017, p. 7.
156 S. CARRERA, *Fit for Purpose? The Facilitation Directive*, cit., p. 18.
157 *Ibid.*, p. 18.
158 D. DADUSC, P. MUDU, *Care without Control: The Humanitarian Industrial Complex and Criminalisation of Solidarity*, in *Geopolitics*, 2020, p. 1205 ss.

assistance" broadly to encompass different forms of solidarity with refugees and migrants, ranging from search and rescue operations to peaceful civil disobedience actions taken by human rights defenders[159]. One could also go further and remove the discretion in the application of the humanitarian exception and make it mandatory for Member States.

However, it is the Member States themselves that ultimately decide how far the European regulatory framework can go. Nevertheless, we have to be clear that the CJEU plays its role in the context of the functioning of a regional integration international organisation. The EUL is to be interpreted systematically. The right of States to combat irregular migration is not unlimited, but rather must be reconciled with their international obligations in other areas[160]. While the instruments of the Facilitators Package offer some flexibility, they may not provide as much leeway for implementation as the Hungarian regulation, which essentially permits the criminalisation of humanitarian aid provided to asylum seekers. It is important to ensure that anti-smuggling regulations do not undermine the rights and protections afforded to applicants for international protection under EUL, particularly in situations where the provision of humanitarian aid may be criminalised.

The Facilitators Package, although it could be improved, has so far shielded the protection of humanitarian aid for asylum seekers. If Member States whose courts are currently facing cases of criminalisation of humanitarian aid do not resolve them by protecting the rights of asylum seekers, they will have to face the CJEU and pay the consequences through coercive or lump sum fines. Ultimately, the EU will be able to channel its actions through the procedure of Article 7 TEU or, now, through the conditionality mechanism. At least, for the time being, the Commission has tried to be diligent in its functions and is taking initiatives to curb state behaviour that endangers the CEAS.

In conclusion, while the CEAS and the criminalisation of humanitarian aid are separate issues, they are both critical to the protection of the rights of asylum seekers and other migrants in Europe. The EU and its Member States has a responsibility to ensure that the CEAS provides effective protection for asylum seekers and that the criminalisation of humanitarian aid does not impede the ability of humanitarian actors to provide assistance to those in need.

159 S. CARRERA, *Fit for Purpose? The Facilitation Directive*, cit., p. 18.

160 A. SÁNCHEZ LEGIDO, *¿Héroes o villanos? Las ONG de rescate y las políticas europeas contra la migración irregular (A propósito del caso Open Arms)*, in *Rev. gen. der. eur.*, 2018, p. 37.